IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
WHEELING DIVISION

CHRISTINA M. FANASE, individually and as Beneficiary of a certain life insurance policy of DEBBILOU SWABADO, deceased, Plaintiff, v. LIBERTY LIFE ASSURANCE COMPANY OF BOSTON, Defendant.	**C.A. No.: 5:10-CV-92**

DEFENDANT'S NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1446, Defendant Liberty Life Assurance Company of Boston ("Liberty Life"), hereby invokes this Court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1441, and states the following grounds for removal:

1. Plaintiff instituted this action on or about August 12, 2010, in the Circuit Court of Brooke County, West Virginia, Civil Action Number 10-C-101 (hereinafter referred to as the "State Action").

2. On August 16, 2010, Plaintiff delivered a copy of the State Action Summons and Complaint to the West Virginia Secretary of State for service upon Liberty Life. The Secretary of State delivered the Summons and Complaint to Corporation Service Company ("CSC") on August 18, 2010. CSC served Liberty Life with a copy of the Summons and Complaint on the same date. True and correct copies of the served Summons and Complaint are attached as Exhibit A.

3. Liberty Life has not served any answer or responsive pleading to the

Complaint, nor made any appearance or argument before the State Court.

4. Removal is proper under 28 U.S.C. § 1441(b) because this Court has original jurisdiction of this action pursuant to 28 U.S.C. § 1331, as this action involves claims that relate to the laws of the United States – specifically, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, et seq.

5. ERISA applies to any "employee benefit plan" if the plan is established or maintained by an employer or employee organization engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C. § 1003. An "employee benefit plan" is defined as a "welfare benefit plan" or a "pension benefit plan." 29 U.S.C. § 1002(3). A plan is a welfare benefit plan if it "was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, … benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1) (references to other types of employer-provided benefits qualifying as ERISA plans omitted) (emphasis added).

6. Plaintiff asserts claims related to Liberty Life's denial of her claim for accidental death benefits allegedly due under Group Life Insurance Policy No. SA3-880-025266-01 ("Policy"). (Complaint, ¶¶ 3, 6-7). Liberty Life issued the Policy to Severstal Wheeling, Inc. ("Severstal")[1] pursuant to the Severstal group life insurance plan ("Severstal Plan" or "Plan"). A copy of the Policy, which is expressly referenced in the Complaint at ¶¶ 3 and 6, is attached as Exhibit B. A copy of the Certificate of Coverage ("Certificate") for the Policy is attached as

[1] Prior to August 4, 2008, Severstal was known as "Wheeling-Pittsburgh Steel Corporation." (Policy, Bates Page No. 0001).

Exhibit C.[2]

7. Debbilou Swabado ("Decedent") was employed by Severstal and participated in the Severstal Plan. Decedent named Plaintiff as the sole beneficiary of the Policy's proceeds. (Complaint, § 3).

8. The Policy and the Certificate demonstrate that (1) the Severstal Plan was established and is maintained by Severstal (Policy (Exh. B) BPN 0001 (identifying Severstal as "sponsor")), (2) the Plan provides certain group life benefits to eligible active and retired employees of Severstal and associated companies (id., BPN 0003 (setting out eligibility requirements), BPN 0008 and 0010 (definitions of "Covered Employee" and "Retired Employee")), (3) benefits under the Plan are funded by Liberty Life through the Policy, (id., BPN 0001 (stating that Liberty Life "agrees to pay the benefits provided by this policy")), (4) Severstal pays the premiums for the certain benefits provided by the Policy (Certificate (Exh. C) BPN 0051 (discussing "Employee Contributions")), and (5) Severstal has the authority to unilaterally terminate the Policy, without consultation with participants, upon 31 days' notice to Liberty Life. (Policy (Exh. B) BPN 0035, at ¶ 2). Severstal also is responsible for certain administrative functions relating to the Plan – such as informing Liberty Life regarding employee eligibility (id., BPN 0038) and issuing Employee Certificates to individual employees. (Id., BPN 0037). The Certificate provides the procedures for submitting Notice and Proof of Claim to Liberty Life (Certificate (Exh. C) BPN 0084 and 0055 (providing address for Liberty Life's Administrative Office)) and instructions for appealing denied claims (id., BPN 0082). These factors establish that the Severstal Plan is an employee welfare benefit plan as defined by, ERISA. Custer v. Pan American Life Ins. Co., 12 F.3d 410, 417 (4th Cir. 1993) ("[t]he existence

[2] The Policy and the Certificate have been Bates Numbered for the convenience of the Court. Hereinafter, citations to either document will be to the Bates Page Number, e.g., "BPN 0001."

of a plan may be determined from the surrounding circumstances to the extent that a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits") (citation omitted).

9. Plaintiff avers in the Complaint that she submitted a claim for accidental death benefits under the Policy and that Liberty Life wrongfully denied her claim and appeal. (Complaint, ¶¶ 6-8). Plaintiff seeks relief under state law claims for bad faith/unfair trade practices (id., Count 1, ¶¶ 9-12) and breach of contract. (Id., Count 2, ¶¶ 13-16).

10. As relief, Plaintiff demands recovery of the "policy proceeds ($50,000.00)," (id., p. 4), "compensable non-economic harm" including "emotional distress, mental anguish, annoyance, aggravation, worry, [and] inconvenience," (id., ¶ 10(b)), "exemplary or punitive damages," (id., ¶ 11), and prejudgment and post judgment interest, and attorneys' fees and costs. (Id., ¶ p. 3).

11. ERISA preempts "any and all State Laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). "A state law relates to a benefit plan, in the formal sense of the phrase, if it has a connection with or reference to such a plan." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).

12. Plaintiff's state-law claims are preempted by ERISA because they relate to an employee benefit plan and are asserted in lieu of federal remedies available to participants of ERISA plans pursuant to 29 U.S.C. § 1132(a). Pilot Life Ins. Co. v. Dedeaux, 481 U.S.C. 41 (1987); Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); Aetna Health Inc. v. Davila, 542 U.S. 200 (2004).

13. Accordingly, this action is removable to this Court pursuant to 28 U.S.C. §§ 1331 and 1441(b).

14. This action is also removed to this Court on the separate and independent basis of the Court's diversity jurisdiction pursuant to 28 U.S.C. § 1332. Upon information and belief, Plaintiff is a citizen and resident of the State of West Virginia. Liberty Life is a corporation incorporated under the laws of Delaware and maintains its principal place of business in Boston, Massachusetts.

15. Pursuant to 28 U.S.C. § 1332(a), the amount in controversy in a diversity action must exceed $75,000, exclusive of interests and costs. To demonstrate that the jurisdictional amount has been met, a removing party must establish only that it is more likely than not that the amount in controversy exceeds $75,000. Woods v. Nationwide Mut. Ins. Co., 2006 WL 1706040 (N.D.W.Va. 2006).

16. The $75,000 amount in controversy threshold is met in this Civil Action because the potential amount of actual damages combined with punitive damages, statutory damages, and attorneys' fees exceed the minimum amount required for removal under 28 U.S.C. § 1332.

17. "[I]t is settled that the test for determining the amount in controversy in a diversity proceeding is 'the pecuniary result to either party which [a] judgment would produce.'" Dixon v. Edwards, 290 F.3d 699, 710 (4th Cir. 2002). When a complaint is filed without an obvious amount in controversy, the court can look to evidence available at the time of removal to fill in the missing amount. The court can also use its common sense to determine an amount for jurisdictional purposes. In addition, the removing party can use the plaintiff's cause of action to show that the amount in controversy is more likely than not in excess of $75,000. Woods, 2006 WL 1706040 (N.D.W.Va. 2006).

18. Plaintiff specifically demands payment of the Policy proceeds at issue in

the amount of $50,000.00. (Complaint, p. 4). In addition, Plaintiff seeks unspecified amounts in pre-judgment and post-judgment interest on the Policy proceeds (id.), attorneys' fees and costs (id.), damages for "emotional distress, mental anguish, annoyance, aggravation, worry, inconvenience, and other compensable non-economic harm" (id., § 10.b.), and "exemplary or punitive damages." (Id., § 11). Defendant is informed and believes that the total damages sought by the Complaint are thus in excess of the statutory minimum of $75,000.00 for purposes of diversity jurisdiction.

19. Plaintiff seeks an unspecified amount in attorneys' fees. Under the "American Rule," attorneys' fees normally do not constitute a part of the amount in controversy because a successful party does not typically collect attorney's fees as part of the judgment. Missouri State Life Ins. Co. v. Jones, 290 U.S. 199, 202 (1933). However, attorney's fees are to be included in calculating the amount in controversy if they are specifically made available by contract or statute. Woods, 2006 WL 1706040; see Patton v. Fifth Third Bank, 2006 WL 771924, at *3 (S.D.W. Va. Mar. 24, 2006); Dunlap v. Green Tree Servicing, LLC, 2005 WL 3177881, at *5 (S.D.W. Va. Nov. 28, 2005); see also Manguno v. Prudential Prop. & Cas. Ins. Co., 276 F.3d 720, 723 (5th Cir. 2002); Spielman v. Genzyme Corp., 251 F.3d 1, 7 (1st Cir. 2001); Galt G/S v. JSS Scandanavia, 142 F.3d 1150, 1156 (9th Cir. 1998).

20. In West Virginia, attorneys' fees are recoverable pursuant to case law interpreting the applicable statutory law. The West Virginia Supreme Court of Appeals has held, "Whenever a policy hold substantially prevails in a property damage suit against its insured, the insurer is liable for . . . the insured's reasonable attorneys' fees in vindicating its claim . . . ." Syl. pt. 1, Hayseeds, Inc. v. State Farm Fire & Cas., 177 W.Va. 323, 352 S.E.2d 73 (1986). Presumptively, reasonable attorneys' fees in a bad faith action are one-third of the face amount

of the policy, unless the policy is either extremely small or enormously large. This follows from the contingent nature of most representations of this sort and the fact that the standard contingent fee is 33 percent. Id. at 329-30, 80.

21. Plaintiff also seeks an unspecified amount of punitive damages. When a plaintiff requests punitive damages, they too are included in the amount-in-controversy analysis. Woods, 2006 WL 1706040. In cases alleging bad faith, if the plaintiff is able to show that the insurer actually knew that the claim was proper but willfully, maliciously, and intentionally denied the claim, then the plaintiff can receive punitive damages. Hayseeds, 177 W.Va. at 331. The Supreme Court of the United States has held that punitive damages awards may exceed compensatory damages awards by “single-digit multiplies.” State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425, 123 S.Ct. 1513 (2003).

22. Accordingly, this Court has original jurisdiction of this action pursuant to 28 U.S.C. § 1332 because there is complete diversity of citizenship of the named parties and because, upon information and belief, Plaintiff is seeking in excess of $75,000.00 in damages. Consequently, the action is removable pursuant to 28 U.S.C. § 1441(a).

23. Liberty Life submits this Notice without waiving any defenses to the claims asserted by Plaintiff or conceding that Plaintiff has pled claims upon which relief can be granted.

24. The State Court from which this action was removed and in which this action was commenced is within this Court’s district and division.

25. This Notice of Removal will be filed promptly with the State Court, as required by 28 U.S.C. § 1446(d).

26. By copy of this document and in accordance with the Certificate of

Service, Liberty Life is providing notice to all Parties in this action advising of the filing of this Notice of Removal pursuant to 28 U.S.C. § 1446(d).

WHEREFORE, Liberty Life gives notice that the referenced action pending in the Circuit Court of Brooke County, West Virginia, Civil Action Number 10-C-101, has been removed to this Court.

Respectfully submitted,

/s/ *Michael G. Gallaway*
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This 13th day of September, 2010

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the within document to be served on Plaintiff's counsel via hand delivery to the following address:

Jay T. McCamic, Esq.
McCamic, Sacco, Pizzuti & McCoid, PLLC
56-58 Fourteenth Street
Wheeling, West Virginia 26003
Tel.: 304-232-6750

/s/ *Michael G. Gallaway*
Michael G. Gallaway (WV Bar No. 5071)

This 13th day of September, 2010

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